

Supplemental Memorandum of Decision: 03-20200413
Withholding Tax
for the Tax Years 2015, 2016, and 2017

NOTICE: IC § 4-22-7-7 permits the publication of this document in the Indiana Register. The publication of this document provides the general public with information about the Indiana Department of Revenue's official position concerning a specific set of facts and issues. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Memorandum of Decision.

HOLDING

The Department agreed with Company that it was entitled to a refund of remaining withholding taxes assessed for certain tax years. The Department also agreed that Company was entitled to a recalculation of interest and penalties owed and was due a partial refund of certain collections fees.

ISSUE

I. Withholding Tax - Refund.

Authority: IC § 6-3-4-8; IC § 6-8.1-5-1; IC § 6-8.1-8-2; IC § 6-8.1-8-4; IC § 6-8.1-9-1.

Taxpayer protests the denial of a refund claim for withholding taxes collected.

II. Tax Administration - Interest, Penalty, and Collection Costs.

Authority: IC § 6-8.1-8-4; IC § 6-8.1-10-1; IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the refund denial of interest, penalties, and collection costs.

STATEMENT OF FACTS

Taxpayer is an out-of-state company which files Indiana withholding tax returns. Taxpayer failed to timely file withholding tax returns for 2015, 2016, and 2017. As a result, the Indiana Department of Revenue ("Department") issued notices of proposed assessment based on the "best information available." The notices were sent to Taxpayer's mailing address; taxpayer failed to respond. Taxpayer also did not respond to subsequently issued demand notices requesting payment. Due to the lack of response, the Department advanced the matter to the warrant stage and the Department's third-party collection agency. Eventually, the collection agency obtained over \$30,000 in withholding taxes, interest, penalties, and collection fees.

Taxpayer later filed its missing withholding tax returns. Taxpayer reported that it owed no withholding tax for 2015, \$432 for 2016, and \$586 for 2017. Taxpayer submitted Form GA-110L requesting a refund of the overpayment of withholding taxes, interest, penalties, and collection fees. The Department granted the request in part and refunded approximately \$16,700 in withholding taxes. The refunded amounts consisted of the overpayment of withholding taxes from May 2016 through November 2017.

Taxpayer disagreed with the partial refund and submitted a protest to that effect. Specifically, Taxpayer protests the refund denial for the remaining withholding taxes collected in 2015 and from January to April 2016. Taxpayer also protests the refund denial for related interest, penalties, and collection fees for tax years 2015, 2016, and 2017. Taxpayer failed to appear for the originally scheduled administrative hearing. Taxpayer requested a rehearing, which was granted. During the rehearing, Taxpayer's representative explained the basis for the protest. This Supplemental Memorandum of Decision results. Additional facts will be provided as necessary.

I. Withholding Tax - Refund.

DISCUSSION

The Department determined Taxpayer was not entitled to a refund and issued two letters on the same date. The first letter denied approximately \$9,600 of the refund claim on the basis that "No other overpayments exist for periods requested." The second letter informed Taxpayer that the partial refund issued was reduced by

approximately \$1,000 for withholding amounts owed for tax years 2016 and 2017.

Taxpayer argues it should be issued an additional refund because it owed significantly less in withholding taxes than collected by the Department. Because no withholding taxes were owed for 2015 and lesser amounts of withholding taxes were owed for 2016 and 2017, Taxpayer also argues interest, penalties, and collection fees should be refunded.

IC § 6-8.1-9-1(a) affords a taxpayer a statutory right to file a claim for refund. This statute provides, in part:

If a person has paid more tax than the person determines is legally due for a particular taxable period, the person may file a claim for a refund with the department.

Under IC § 6-3-4-8(a), any employer "making payments of wages subject to tax under [Art. 6-3]. . . is required. . . to withhold, collect, and pay over income tax on wages paid. . . [and] deduct and retain therefrom the amount prescribed in withholding instructions issued by the department." Generally, an employer shall pay withholding taxes monthly; however, if the average monthly amount of withholding taxes for the previous calendar year does not exceed \$1,000, the employer may pay the tax by calendar year instead of monthly filings. IC § 6-3-4-8(b).

If the Department reasonably believes a person has not reported the proper amount of tax due, the Department shall make a proposed assessment based on the "best information available." IC § 6-8.1-5-1(b).

Taxpayer provided a detailed accounting of assessments and fees collected by the Department, bank statements, and a log of prior contacts with the Department regarding the assessments. Taxpayer also advised that in 2015, it had no Indiana payroll, so no withholding taxes were due. Payrolls in 2016 and 2017 were minimal, and Taxpayer does not dispute that it owed \$432 for 2016 and \$586 for 2017. Taxpayer also stated an employee (a manager) indicated the returns were filed; however, it was later discovered the manager failed to comply with the required filing deadlines.

The Department issued the assessments on the "best information available" considering the Taxpayer's previous withholding activity. A review of the Department's records confirms that no withholding taxes were due for 2015, and the previously mentioned amounts for 2016 and 2017 were correct. When Taxpayer filed the required returns, the Department should have issued a refund for any overage amounts of withholding taxes collected.

Department records show the refund amounts for withholding taxes collected from May 2016 to November 2017 were correctly refunded. However, the Department incorrectly denied the refund request for amounts related to January 2015 through April 2016. Because Taxpayer owed no withholding taxes for 2015, all of the withholding tax amounts collected for 2015 should have been refunded. A partial refund was issued for January 2016 when the entire amount collected should have been refunded. All withheld monies collected for withholding tax in February, March, and April 2016 should have also been refunded.

FINDING

Taxpayer's protest is sustained.

II. Tax Administration - Interest, Penalty, and Collection Costs.

DISCUSSION

Taxpayer also protests the refund denial of the interest, penalties, and collection costs for the assessments from 2015, 2016, and 2017.

As previously mentioned, the Department may make a proposed assessment based on the "best information available." IC § 6-8.1-5-1(b). The assessment is considered a tax payment which, if not made by the due date, accrues penalties and interest. *Id.* If the proposed assessment remains unpaid, the Department adds a collection fee of ten percent of the unpaid tax to the total amount due. IC § 6-8.1-8-2(b). The Department may contract with a collection agency for the "collection of a delinquent tax plus interest, penalties, collection fees, sheriff's costs, clerk's costs, and reasonable fees. . ." IC § 6-8.1-8-4(a).

If a person fails to file a return, the person is subject to interest on the nonpayment. IC § 6-8.1-10-1(a). Interest accrues via a statutorily described rate, and the Department may not waive interest imposed. IC § 6-8.1-10-1(c) and (e).

In addition to interest, the Department may also impose a ten percent penalty under IC § 6-8.1-10-2.1(b). However, if the person can show the failure to file a return was due to reasonable cause and not due to willful neglect, the penalty can be waived by the Department. IC § 6-8.1-10-2.1(d).

Reasonable cause is defined by [45 IAC 15-11-2\(b\)](#) as:

"Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case-by-case basis according to the facts and circumstances of each taxpayer.

Finally, if the assessed tax remains unpaid, the Department may advance the matter to a tax warrant that can be collected as any other debt due to the State. IC § 6-8.1-8-4(a). Measures taken to collect the debt can include contracting with a collection agency for the delinquent taxes plus interest, penalties, collection fees, sheriff's costs, clerk's costs, and other reasonable fees. *Id.*

As a result of failing to file the required returns, the assessments in Taxpayer's case advanced from the proposed assessment stage to the demand notice stage, to the warrant stage beginning in mid-March 2017 and continuing through July 2018. Taxpayer was told during this time by the manager employee that all filing requirements were met. Taxpayer did not learn that the returns had not been filed until much later.

Taxpayer provided documentation that it contacted the Department multiple times beginning in January 2018. At least one of the contact dates can be confirmed by the Department's records. When Taxpayer contacted the Department, a hold should have been placed on the account and collection fees, penalties, and interest should have stopped accruing. Unfortunately, that did not happen. The Department continued to advance monthly assessments to the warrant stage despite Taxpayer's repeated attempts to rectify the matter.

Based on the facts known to the Department at the time, the Department correctly assessed and collected interest, penalties, and collection fees. Per IC § 6-8.1-10-1, the Department may not waive interest. However, the Department is only entitled to collect interest on the actual tax amount owed by Taxpayer. The Department will review Taxpayer's account and recalculate the interest due based on the amount of withholding taxes owed by Taxpayer. To be clear, the Department is not refunding interest inapposite of the statute, but rather correcting the calculation of interest based on the amount of base tax correctly owed by Taxpayer.

Penalties accrued because Taxpayer's manager employee said the withholding tax returns were filed when, in reality, nothing was filed on Taxpayer's behalf. Taxpayer admits it had no idea the returns were not filed. Additionally, it appears Taxpayer lacked an internal control system to ensure the withholding tax returns were filed timely. This constitutes negligence on the part of Taxpayer, so penalties cannot be waived. However, pursuant to IC § 6-8.1-10-2.1(b), the Department may only collect a ten percent penalty of the full amount of tax due when a taxpayer fails to file a return. Akin to the recalculation of interest discussed above, the Department will review Taxpayer's account and reduce the penalties owed by the same percentage that the base tax is reduced.

Finally, when this matter was advanced to the warrant stage and forwarded to the Department's collection agency, collection fees were appropriately collected. Nevertheless, when Taxpayer contacted the Department in January 2018, a hold should have been placed on the account so that collection fees stopped accruing. This was not done. As such, Taxpayer is entitled to a refund of any collection fees obtained by the Department from January 2018 going forward related to the withholding tax returns.

FINDING

Taxpayer's protest is sustained in part and denied in part.

SUMMARY

Taxpayer's protest of the Department's decision denying a refund of the withholding taxes is sustained. To the extent Taxpayer overpaid any withholding taxes in excess of the actual amounts of base tax due in 2015 and 2016, the overages should be refunded.

Taxpayer's protest of the Department's decision denying a refund of the interest and penalties is sustained in part and denied in part. Interest for all tax years should be recalculated based on the actual amount of withholding taxes owed by Taxpayer. Similarly, any penalty owed by Taxpayer should be recalculated based on the new withholding tax amount owed.

Taxpayer's protest of the Department's decision denying a refund of collection fees is sustained in part and denied in part. Collection fees paid by Taxpayer beginning in January 2018 and after will be refunded.

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